United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1131
76-1160

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

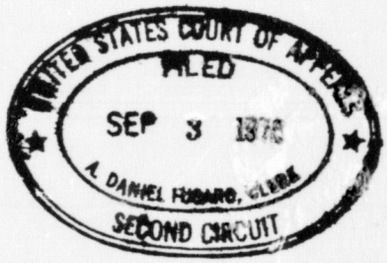
Plaintiff-Appellee,

-against-

JAMES SEELEY CYPHERS and
JAMES W. FERRO,

Defendants-Appellants.

Docket No. 76-1131
Docket No. 76-1160



BRIEF FOR APPELLANT JAMES W. FERRO

ON APPEAL FROM JUDGMENTS
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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BRIEF FOR APPELLANT JAMES W. FERRO

ON APPEAL FROM JUDGMENTS
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the proof in this case failed to establish a violation of 18 U.S.C. §1341.

2. Whether the reversal of the judgment of conviction on indictment 74 Cr. 322 is necessary because the Government failed to prove, as required, that the airline tickets involved had been procured as a result of a fraudulent scheme.

3. Whether appellant Ferro was denied his right to a speedy trial.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from two judgments of the United States District Court for the Eastern District of New York (The Honorable Thomas C. Platt) rendered on March 5, 1976, after a jury trial, convicting appellant James W. Ferro of three counts of mail fraud (18 U.S.C. §1341) (74 Cr. 322, Counts I and II and 75 Cr. 259, Count I). On Indictment 75 Cr. 259 and Count I of 74 Cr. 322, appellant Ferro was sentenced to a term of imprisonment of four years, to run concurrently, and was required to pay a fine amounting to $2,000. On Count II of Indictment 74 Cr. 322, Ferro was sentenced to a five-year term of incarceration and a $1,000 fine. Execution of the sentence on Count II of 74 Cr. 322 was suspended, and appellant was placed on probation for five years, to be served consecutively to the sentence imposed under Count I of 74 Cr. 322 and 75 Cr. 259.

By order of this Court dated June 8, 1976, the two judgments involved in this case were consolidated for purposes of appeal, and by order dated April 9, 1976, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel for appellant Ferro on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. Arrest and Indictment 73 Cr. 848[1]

Based on Postal Inspector Robert McDowall's complaint charging appellant Ferro with, inter alia, a fraudulent scheme to obtain airlines tickets by use of credit cards, appellant Ferro and co-defendant Cyphers were arrested on March 20, 1973.

On September 18, 1973, an indictment was filed charging appellant Ferro and co-defendant Cyphers with forty-three counts of mail fraud (Indictment 73 Cr. 848). As part of the scheme alleged, appellant Ferro was charged with defrauding airlines companies by obtaining tickets through the use of lost, stolen, and/or altered credit cards. Count XX of that indictment charged that, for the purpose of executing the scheme, in February 1973 appellant Ferro and co-defendant Cyphers caused a letter to be delivered to Dr. I. Simon.

On September 19, 1973, the Government filed a notice of readiness for trial (Record on Appeal, Document #3, 73 Cr. 848). Although appellant Ferro had been detained at Federal Detention Headquarters in New York City from September 25, 1973, his arraignment on the mail fraud charges did not occur

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[1]Indictment 73 Cr. 848 is included as part of B to the joint appendix to appellants' briefs.

until October 12, 1973.[2] At that time counsel was appointed, and appellant Ferro entered a plea of not guilty.

B. Motions to Dismiss Indictment 73 Cr. 848

On October 17, 1973, appellant Ferro moved to dismiss the indictment based on the ground that the Government had denied him a speedy trial by violating the applicable provisions of the Eastern District's Plan for Achieving Prompt Disposition of Criminal Cases ("Eastern District Plan") promulgated pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure. Specifically, appellant Ferro contended that the Government was not ready for trial within six months from the date of arrest, as required by Rule 4 of the Eastern District Plan, since the initial date of pleading, set by the Government, occurred twenty-two days after the requisite time period had elapsed (Record on Appeal, Document #6, 73 Cr. 848).

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[2]After appellant Ferro's arrest, on March 30, 1973, bail was reduced to a $10,000 personal recognizance bond, and Ferro was released from Federal custody. On July 19, 1973, with the Government's full knowledge, Ferro surrendered himself to the State of Ohio to serve a term of imprisonment for a previous conviction under state law. On September 20, 1973, Assistant U.S. Attorney Emanuel Moore requested that a writ of habeas corpus ad prosequendum be issued (Record on Appeal, Document #4), and, five days later, appellant Ferro arrived at the Federal Detention Center in New York City.

Without a hearing or specific findings of fact, the District Court denied the motion, stating that "under the circumstances, our Court of Appeals has indicated that [fraud cases are] ... one of the type of cases where the Government is granted a little more than the usual x number of days where an indictment shall be dismissed without any further facts" (October 26, 1973, at 13[3]).

In addition, defense counsel for appellant Ferro moved to sever appellant's case from that of his co-defendant. This motion was summarily denied (see June 7, 1974, at 22), and the proceedings were adjourned until November 16, 1973, so that discovery and other pretrial matters could be completed (October 26, 1973 at 16, 14, 18-20). On November 16, 1973, the case was adjourned to December 21, 1973. Additional adjournments occurred on January 18, 1974; February 1, 1974; February 5, 1974; and February 15, 1974.

On February 19, 1974, appellant Ferro moved to dismiss Indictment 73 Cr. 848, based on the Supreme Court's decision in United States v. Maze, 414 U.S. 395 (1974). This motion was granted on April 5, 1974, and the indictment was dismissed (April 5, 1974, at 4, 9). At that time, the District Court

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[3]Numerals in parentheses preceded by a date refer to pages of the transcript of pretrial proceedings occurring on that date. Judge Travia's oral opinion denying appellant Ferro's motion is reproduced as F to the joint appendix to appellants' briefs.

was informed by the Assistant U.S. Attorney that he would "get a superseding indictment" (April 5, 1974, at 3). Despite defense counsel's explanation that appellant Ferro's further detention in New York made it difficult for him to appear before the parole board in Ohio (April 5, 1974, at 6), the District Court continued appellant Ferro's incarceration in the Federal Detention Center at West Street pending re-indictment (Record on Appeal, Document #17, 73 Cr. 848) and refused to eliminate co-defendant Cyphers' bail (April 5, 1974, at 4, 7).

C. Indictment 74 Cr. 322[4]

On April 23, 1974, a "superseding indictment" was filed charging appellant Ferro with two counts of mail fraud. The scheme alleged in 74 Cr. 322 was the same one charged in the indictment which had already been dismissed. The superseding indictment charged appellant Ferro with defrauding airlines companies by obtaining tickets through the use of lost, stolen, and/or altered credit cards. Count XX of Indictment 73 Cr. 848

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[4]Indictment 74 Cr. 322 is included as part of B to the joint appendix to appellants' briefs.

was realleged as Count I of Indictment 74 Cr. 322.[5] In addition, Count II of the superseding indictment charged that pursuant to the scheme, on February 19, 1973, appellant and his co-defendant Cyphers had caused to be mailed to Dr. Stuart Silvan a letter containing fraudulently obtained airlines tickets. On May 13, 1974, the Government filed a notice of readiness for trial (Record on Appeal, Document #4, 74 Cr. 322).

On May 14, 1974, appellant Ferro moved to dismiss Indictment 74 Cr. 322, contending that he was arrested on March 19, 1973;[6] that Indictment 74 Cr. 322, based on the March 19, 1973, arrest, was filed more than thirteen months later; and consequently that the Government was not ready for trial within the required six-month period, in violation of Rule 4 of the Eastern District Plan (June 7, 1974, at 3-6, 8-9, 14-16). Arguing that he "kn[ew] of no case that clearly comes within the six month rule" (June 7, 1974, at 18), and relying on an affidavit furnished by Postal Inspector Robert McDowall, which described the investigation which had occurred

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[5]The Assistant U.S. Attorney stated in an affidavit that Count XX of Indictment 73 Cr. 848 "formed the basis for the superseding indictment" (Record on Appeal, Document #21). Specifically, Count I of 74 Cr. 322 charged that on February 3, 1973, a letter containing fraudulently obtained airlines tickets had been mailed to Dr. I. Simon.

[6]Trial counsel inadvertently alleged that appellant Ferro had been arrested on March 19, 1973. The complaint was issued on that date. However, the record shows that the date of arrest itself was March 20, 1973 (January 5, 1976, at 14A).

during the summer of 1973,[7] the Assistant U.S. Attorney contended that the total period of thirteen months' delay was not chargeable to the Government (June 7, 1974, at 16; Record on Appeal Document #9, 74 Cr. 322, at 3-4). Without holding a hearing or making specific findings of fact, the District Court denied appellant Ferro's motion to dismiss (June 4, 1974, at 20).

Later in May 1974, co-defendant Cyphers and appellant Ferro moved to dismiss Indictment 74 Cr. 322. Relying on United States v. Maze, supra, they argued that the mailings alleged were not sufficiently connected with the fraudulent scheme charged to satisfy the requirements of 18 U.S.C. §1341. This motion was denied in an opinion dated June 11, 1974.[8]

On November 15, 1974, the proceedings were adjourned for one week, and on November 20, 1974, appellant Ferro filed a motion dismiss the indictment, essentially renewing the previous speedy trial motion. Appellant argued that the applicable period of delay commenced to run on March 20,1973, the

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[7]This affidavit, submitted in opposition to appellant's motion to dismiss, is Document #9 (74 Cr. 322) to the Record on Appeal.

[8]The opinion is D to the joint appendix to appellants' briefs.

date of his arrest, and that since the Government had filed the relevant indictment more than thirteen months after the arrest, it was not ready for trial within six months, as is required by Rule 4 of the Eastern District Plan. In addition, appellant Ferro renewed his contention that since the Government had failed to schedule the pleading to Indictment 73 Cr. 848 within the required six months, Indictment 73 Cr. 848 should have been dismissed with prejudice, precluding his reindictment.

The District Court denied this motion in an opinion dated December 18, 1974.[9] Without holding a hearing, Judge Platt found that the time needed for McDowell's investigation constituted exceptional circumstances under Rule 5(c)(ii) of the Eastern District Plan, justifying the delay between arrest and appellant Ferro's plea to Indictment 73 Cr. 848. Moreover, the District Court rejected the contention that the delay of thirteen months from arrest to the filing of the superseding indictment was a violation of the six-month rule (Rule 4), stating:

> Acceptance of such a contention would preclude any superseding indictment where more than six months had elapsed from the date of arrest.
>
> Appendix E at 4.

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[9]This opinion is E to the joint appendix to appellants' briefs.

On February 21, 1975, a conference was held to schedule a trial date. At that time, the Government stated that it was unprepared for trial since one of its witnesses, Dr. Silvan, had suffered a heart attack. Although appellant Ferro was ready to proceed, the case was adjourned to February 28, 1975 (February 21, 1975, at 2-3). On February 28, the Assistant U.S. Attorney informed the District Court that a long delay was necessary because of Dr. Silvan's illness, and the proceedings were adjourned to March 14. On March 21, 1975,[10] the case was adjourned to April 4, 1975.

D. Indictment 75 Cr. 259[11]

On April 1, 1975, another indictment was filed charging appellant Ferro and co-defendant Cyphers with one count of mail fraud. This indictment alleged that on February 26, 1973, pursuant to the same scheme charged in Indictment 74 Cr. 322,[12] fraudulently obtained airlines tickets had been mailed to Dr.

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[10] No record of a court appearance on March 14, 1975, was noted on the docket sheet.

[11] Indictment 75 Cr. 259 is included in B to the joint appendix to appellants' briefs.

[12] At trial, the jurors considered Indictment 75 Cr. 259 to be a third count of 74 Cr. 322. This view was confirmed by the District Court (T.572). (Numerals in parentheses preceded by "T" refer to pages of the trial transcript).

I. Simon. More than two months later, on June 6, 1975, the Government's notice of readiness for trial was filed.

On April 9, 1975, appellant Ferro moved to dismiss Indictment 75 Cr. 259, based on two grounds: (1) that there had been unnecessary delay in presenting the charge to the grand jury and in bringing appellant to trial (Rule 48(b), Fed.R.Cr.P.); and (2) that the filing of the indictment more than two years after arrest on the mail fraud charge violated the Eastern District Plan promulgated pursuant to Rule 50(b), Fed.R.Cr.P. This motion was denied on April 18, 1975.[13]

On May 21, 1975, Judge Platt reassigned the case to Judge Watson.[14] On June 2, Judge Watson set July 28, 1975, as the date on which the trial would be commenced.[15] On July 28, appellant Ferro's co-defendant Cyphers failed to appear, and a bench warrant was ordered. In light of the co-defendant's failure to appear, counsel for appellant Ferro moved to sever appellant Ferro's case, and requested a trial date (July 28,

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[13]Additional adjournments occurred on April 25, 1975, and on May 9, 1975.

[14]Judge Watson, a Court of Claims judge, was assigned to sit in the Eastern District of New York during the summer of 1975.

[15]On June 2, 1975, trial counsel stated:

> I've been pushing for trial all along. I've gone so far as to ask for a severence.
>
> (June 2, 1975, at 3).

1975, at 16, 18).[16] The District Court denied the motion but stated that the trial would commence on August 18 (July 28, 1975, at 18). On August 18, 1975, Judge Watson informed counsel that he would be unable to try the case during the period of his assignment to the Eastern District and therefore would return the case to Judge Platt (August 18, 1975, at 5). Appellant Ferro reiterated that he was ready for trial and requested an immediate trial before any available judge (August 18, 1975, at 5, 6).

During the more than two and one-half years of pretrial proceedings, appellant Ferro had been represented by John Gutman, Esq., an attorney in the Eastern District trial office of The Legal Aid Society, Federal Defender Services Unit. Had this case proceeded to trial within a reasonable period of time, Mr. Gutman, the attorney originally assigned, would have represented Mr. Ferro at trial. However, after the protracted delay, Mr. Gutman terminated his employment with the Eastern District trial office of the Federal Defender Services Unit, necessitating the assignment of new counsel. Because of this development, newly assigned counsel found it necessary to seek a reasonable delay in which to prepare for trial (November 14,

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[16] Defense counsel told the judge:

> Judge, I give up, I don't know what to do any more to get a trial.
>
> (July 28, 1975, at 17).

1975, at 4, 5). On November 14, 1975, the case was adjourned until January 5, 1976.[17]

E. The Trial

The trial commenced on January 5, 1976. Indictments 74 Cr. 322 and 75 Cr. 259 were tried jointly. The Government's proof consisted of evidence relating to the scheme alleged, prior similar acts, and the specific counts charged in the indictment.

1. Evidence Relevant to the Specific Counts Charged in the Indictment

One credit card and one driver's license, each bearing the name Richard Redstrom; one charge slip dated February 26, 1973 (T.134) (GX 32),[18] reflecting the purchase of airline tickets with the Redstrom credit card; and the set of tickets purchased at that time (T.134) (GX 45, 46) constituted the Government's documentary proof of the three specific counts charged in the indictments (T.43, 46, 129, 132, 249).[19]

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[17]Despite its previous opposition, on November 14, 1975, the Government was amenable to trying appellant Ferro separately from his co-defendant, Cyphers.

[18]Numerals in parentheses preceded by "GX" refer to the exhibit numbers of the Government's exhibits in evidence.

[19]Two slips of paper with the address of Drs. Simon and Silvan, respectively, were also admitted in evidence (GX18; T.60, 61).

George Nagin, a jeweler, testified that in February 1973 Dr. I. Simon ordered a set of airline tickets through Nagin (T.196); that Simon gave Nagin the money for the tickets; and that Nagin, in turn, gave the money to co-defendant Cyphers or appellant Ferro (T.197).

Confirming portions of Nagin's testimony, Dr. Simon stated that in the first part of February 1973 he purchased a set of airline tickets. Simon testified that he paid Nagin in advance, received the tickets in the mail a few days after payment, and used the tickets for a flight on February 8, 1973 (T.244, 245, 253, 256). There was no proof about how this set of tickets had been obtained and whether they had been obtained from the airlines pursuant to the scheme charged in the indictment.

Further, Simon testified that he bought another set of tickets at the end of February 1973; that he paid Nagin for the tickets at Nagin's home; and that he subsequently received the tickets in the mail (T.248-250). Simon identified GX45 and 46 as the tickets purchased as a result of this transaction (T.248). Simon also stated that in mid-February 1973 he ordered a ticket for Dr. Stuart Silvan and paid for that ticket at the time of ordering it, prior to receipt (T.247).

Silvan testified that he received the ticket in the mail (T.231-232) and used it to fly to Florida in February 1973 (T.232). There was no proof about how this ticket had been obtained and whether it had been purchased from the airlines

pursuant to the scheme charged in the indictment.

James Hamrick, a document analyst for the U.S. Postal Service, testified on behalf of the Government. He stated that in his opinion the signatures on the Redstrom credit card and driver's license and the sales slip reflecting the purchase of one set of airline tickets (GX 32) were written by appellant Ferro (T.301).

2. Evidence Relevant to the Scheme Alleged and Prior Similar Acts

Three credit cards, two Florida drivers' licenses, a lighting fixture, six envelopes containing numerous slips of paper (GX 16-21), various charge slips, and five bulletins used by credit card companies to identify lost or stolen credit cards were admitted into evidence (T.43, 46, 49, 56, 63)[20] to show the scheme alleged. One of the credit cards and one driver's license were issued to Arthur Mastmond (T.42, 47); another credit card and driver's license bore the name Douglas Eppollito (T.42, 46).

Frank McDonald, an employee of Eastern Airlines, testified that the Douglas Eppollito credit card had been issued in in 1969 to Douglas E. Pollitt, a lawyer with a New York City

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[20] All the exhibits, except one credit card, were seized at the time of arrest (T.41, 51).

law firm (T.88); that it had been reported lost in 1973 (T. 89, 91); and that the Mastmond card had been issued to Arthur Simon of Moco Products, Inc., and not to Arthur Mastmond (T. 107).[21]

In addition, various credit card charge slips, not relevant to the specific counts alleged and which reflected purchases of airline tickets with those cards originally issued to Pollitt (T.92, 94)[22] and Simon (T.111-112) were admitted in evidence.

Likewise, the six envelopes which had been admitted in evidence (GX 16-21) were all unrelated to the specific counts charged in the indictments (T.57, 61).[23]

Similarly, a credit card bearing the name of William McKinley of Allenwood Steel Company and charge slips reflecting purchases with that card (T.144-145) (GX 39, 48) (T.265) were entered, not as direct proof of the specific crimes charged, but as proof of the scheme alleged (T.136, 137).

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[21]It was stipulated that Eastern Airlines received notification that the credit card issued to Arthur Simon had been lost (T.110).

[22]McDonald testified that the charge slips for tickets purchased with the Pollitt card were not paid (T.101, 104).

[23]The District Court told the jurors:

> All 16 through 21 [referring to the numbers of the Government's exhibits] are showing the scheme, plan or similar act except for part of 18, that is what the Government hopes to connect to the mailings.
>
> (T.61).

Richard Rooney, an employee of United Airlines, testified that the McKinley credit card had been issued to William Finley; that it had been reported lost or stolen; and that the purchases reflected by the charge slips (GX 39) were unpaid (T.138, 145a). William Finley testified that his credit card was lost on October 17, 1972 (T.164-165); that he never authorized anybody to sign for him (T.166); and that the signature on the charge slips (GX 39) was not his (T.167).

June Roberts, a ticket agent for Eastern Airlines, identified appellant Ferro (T.266) as the person who had used the McKinley card in an attempt to purchase three airline tickets at a ticket office in Baltimore (T.263-267).[24]

As further proof of the scheme charged but not of the specific offenses alleged, James Hamrick, the Government's document analyst, stated that in his opinion the signature on the Eppollito and Mastmond credit card charge slips and drivers' licenses were written by appellant Ferro (T.306, 309), as were the signatures on the McKinley credit card and charge slips (T.310).

After deliberations, the jurors found appellant Ferro and co-defendant Cyphers guilty as charged in the two indictments.

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[24] Xerox copies of these tickets were admitted in evidence (GX 49) (T.266). In addition, a clerk at Doubleday Bookstores testified that co-defendant Cyphers purchased a record with a credit card issued to Fred Preston Staff (T.169) (see GX 41; see also GX 42A, 42B, 42C). Kale, contradicting this testimony, later admitted that he did not remember Cyphers' actually signing the card, but remembered him from court (T.186).

ARGUMENT

Point I

THE PROOF IN THIS CASE FAILED TO ESTABLISH A VIOLATION OF 18 U.S.C. §1341.

Appellant Ferro was convicted of three separate counts of mail fraud, in violation of 18 U.S.C. §1341. The Government's theory of each count was that an individual wishing to purchase an airline ticket had advanced payment for the ticket to appellants Ferro and/or Cyphers, who then purchased the airline ticket from an airline ticket agent by use of a fraudulent credit card. The airline ticket was thereafter mailed to the original purchaser. It was this mailing upon which the Government relied to bring each alleged fraud within the mail fraud statute. Under United States v. Maze, 414 U.S. 395 (1974), however, these mailings were not sufficient for that purpose.[25] See also Parr v. United States, 363 U.S. 370 (1960).

In Maze, supra, the Supreme Court made clear that the mail fraud statute requires that the mails be used for the

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[25] Appellant Ferro also contends that Indictment 74 Cr. 322 charging two counts of mail fraud must be dismissed, since the Government failed to prove that the tickets involved were procured through a fraudulent scheme, as charged. See Point II of appellant Ferro's brief.

purpose of executing the scheme charged:[26]

> Congress could have drafted the mail fraud statute so as to require only that the mail be in fact used as a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the mails be "for the purpose of executing the scheme or artifice...."
>
> United States v. Maze, supra, 414 U.S. at 395.

Thus, in Maze, supra, the Court found that mailings which, although caused by a fraudulent activity, were subsequent and merely incidental to that fraud were insufficient to constitute a violation of §1341.

A similar conclusion is required in the present proceeding. Here, as in Maze, the fraudulent use of the credit card had already occurred and the defendants had already obtained the "fruits" of that fraud, the airline ticket, before the mailings took place. Compare United States v. Marando, 504 F.2d 126, 129-130 (2d Cir. 1974).[27] Indeed, in this case,

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[26] 18 U.S.C. §1341 is limited in scope:

> The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state [or Federal (See 15 U.S.C. §1644)] law.
>
> Kann v. United States, 323 U.S. 88, 95 (1944).

[27] Indeed, in Maze, supra, 414 U.S. at 402, the Supreme Court found that even in a continuing scheme, each individual purchase by credit card must be considered separately with

the mailings were even more subsequent and remote from the fruition of the scheme than in Maze. Here, the defendants had not only obtained the airline ticket, but, unlike Maze, had already received cash payment for that ticket when the mailing occurred. Thus, as in Maze, the mailing here bore no relation to appellants' acquisition of the fruits of their fraud.

Nor did the mailing of the airline tickets in this case serve to delay appellants' apprehension by the authorities. Compare United States v. Sampson, 371 U.S. 75, 80 (1962). Here, as in Maze, the fraud was discovered by the victim airlines when, as a result of their normal credit billing practices, they discovered that the credit cards had been misused. The mailing of the airline tickets had no effect whatsoever on delaying those billing practices, and hence caused no delay in appellants' apprehension.

Since the mailings in this case were not made for the purpose of executing the alleged fraud, but rather were only subsequent and incidental to that fraud, no violation of §1341 occurred. Appellant Ferro's conviction under that statute must therefore be reversed and the indictment dismissed. United States v. Maze,

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(Footnote continued from the preceding page)

the fraud being complete upon each discrete receipt of the goods and/or services. This holding clearly rejected the view of the dissent, articulated at 414 U.S. at 413-414, that each purchase was simply one part of a larger fraud.

supra, 414 U.S. at 402; Kann v. United States, supra, 323 U.S. at 94; see also United States v. Sampson, 371 U.S. 75, 80 (1962); Parr v. United States, supra, 363 U.S. at 393; United States v. Ettesvold, 502 F.2d 875, 880 (7th Cir. 1974); compare Pereira v. United States, 347 U.S. 1 (1954); United States v. Marando, 504 F.2d 126, 129-130 (2d Cir. 1974), and United States v. Stern, 500 F.2d 678, 680 (9th Cir. 1974).

Point II

REVERSAL OF THE JUDGMENT OF CONVICTION ON INDICTMENT 74 Cr. 322 IS NECESSARY BECAUSE THE GOVERNMENT FAILED TO PROVE, AS REQUIRED, THAT THE AIRLINE TICKETS INVOLVED HAD BEEN PROCURED AS A RESULT OF A FRAUDULENT SCHEME.

The essential elements of 18 U.S.C. §1341 are (1) a scheme to defraud and (2) the use of the mails in furtherance of executing the scheme. United States v. Finkelstein, 526 F.2d 517, 526 (2d Cir. 1975); Pereira v. United States, supra, 347 U.S. at 8; United States v. Nance, 502 F.2d 615, 618 (8th Cir. 1974); United States v. Green, 494 F.2d 820, 823 (5th Cir. 1974). Pursuant to this statute, Indictment 74 Cr. 322 charged appellant Ferro with a scheme to defraud airline companies by obtaining tickets through the use of lost, stolen, and/or altered credit cards. Specifically, Count I charged that, pursuant to this scheme, on February 3, 1973, appellant Ferro and his co-defendant Cyphers had caused to be mailed to Dr. I. Simon a letter containing fraudulently obtained airline tickets. Similarly, Count II charged that, on February 19, 1973, appellant Ferro and co-defendant Cyphers had caused to be mailed to another doctor a letter containing airlines tickets obtained as a result of the fraudulent scheme. Additionally, Indictment 75 Cr. 259 alleged that on February 26, 1973, pursuant to this same scheme, another set of fraudulently obtained airline tickets had been mailed to Dr. I. Simon.

Thus, in the context of the relevant statute and indictments, in order to show a violation of 18 U.S.C. §1341, the Government was required to prove that the specific airline tickets which were the subject of the two indictments had been purchased with fraudulent credit cards[28] pursuant to the scheme charged.[29] Even interpreting the proof in the light most favorable to the Government, the evidence supporting Indictment 74 Cr. 322 failed to show that this was the fact.

Here, the evidence relevant to the three specific counts charged consisted of one credit card and one driver's license, each bearing the name Richard Redstrom; one charge slip dated February 26, 1973, reflecting the purchase of airline tickets with the Redstrom card, and the set of tickets purchased at that time identified at trial by Dr. Simon. It is undisputed that all of this evidence related to the mailing to Dr. I. Simon alleged to have occurred on or about February 26, 1973. Thus, this evidence pertained only to that crime charged in Indictment 75 Cr. 259. Consequently, there was no proof, as is required, about how the tickets which were the subject of Indictment 74 Cr.

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[28] Indeed, in his opening remarks, the Assistant U.S. Attorney told the jurors that the Government would show that the airline tickets mailed on or about February 3, 1973, to Dr. Simon, and those mailed to Dr. Silvan were obtained through the fraudulent use of credit cards (7).

[29] In addition, the Government was required to prove the use of the mails in furtherance of the execution of the scheme. It is appellant's position that any use of the mails shown did not constitute a violation of 18 U.S.C. §1341 (see Point I, supra).

322 had been obtained and whether they had been obtained from the airlines as a result of a scheme which utilized altered credit cards.

Likewise, there was no proof that the mailings to Dr. Simon on or about February 3, 1973, and to Dr. Silvan on or about February 19, 1973, were related to the fraud on the airlines which had been charged in Indictment 74 Cr. 322.

Since the Government failed to prove a violation of 18 U.S.C. §1341, reversal of Counts I and II of Indictment 74 Cr. 322 is required.

Point III

APPELLANT FERRO WAS DENIED HIS RIGHT TO A SPEEDY TRIAL.

A. Because the delay in this case violated the Eastern District Plan for the Prompt Disposition of Criminal Cases, reversal of the conviction and dismissal of Indictment 75 Cr. 259 are required.

Rule 4 of the then-applicable Eastern District Plan for Achieving Prompt Disposition of Criminal Cases provided that:

> [i]n all cases the government must be ready for trial within six months from the date of the arrest....

In this case, appellant Ferro was arrested on March 20, 1973. Indictment 75 Cr. 259, based on that arrest, was returned on April 1, 1975, and the Government's notice of readiness was not filed until June 6, 1975. This long delay between arrest and the Government's readiness for trial requires reversal of the judgment (Indictment 75 Cr. 259) and remand with a direction to dismiss that indictment with prejudice.

Successive indictments charging the same mail fraud scheme but different mailings are considered to be parts of one continuing prosecution. Hanrahan v. United States, 348 F.2d 363, 366 (D.C. Cir. 1965). Consequently, for speedy trial purposes, the time begins to run from the date of arrest on the original mail fraud scheme charged. Hanrahan v. United States, supra;

cf. United States v. Flores, 501 F.2d 1356, 1359 n.3 (2d Cir. 1974); see also United States v. Furey, 500 F.2d 338, 342 (2d Cir. 1974); Rule 4 of the Eastern District Plan. Absent any excludable periods, it continues to run until a notice of readiness is filed on any subsequent charge arising out of the same scheme.

Here, appellant Ferro was arrested on the original charge on March 20, 1973, and the Government's notice of readiness was not filed on the successive charge until June 6, 1975. Although the District Court failed to hold a hearing (see, e.g., United States v. Scafo, 470 F.2d 748, 750-751 (2d Cir. 1972); United States v. McDonough, 504 F.2d 67, 68 (2d Cir. 1974); United States v. Valot, 473 F.2d 667, 668 (2d Cir. 1973); United States v. Flores, supra, 501 F.2d at 1360) to determine whether any time was excludable from the more than two-year period of delay (see Rule 5 of the Eastern District Plan), it is clear that the Government did not comply with Rule 4's six-month requirement. In fact, the record shows that there was a delay of at least one year and twenty-five days which could not be attributable to appellant and was not excludable under the applicable provisions of Rule 5 of the Eastern District Plan.[30] This delay consisted of the following periods:

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[30] Appellant Ferro contends that as to any time periods other than this twelve month, twenty-five day delay, a hearing is required to determine the applicability of the provisions of Rule 5 of the Eastern District Plan. See Point III-B of appellant's brief.

2 months, 5 days	August 7, 1973	The last possible day of Agent McDowall's investigation
	October 12, 1973	Initial entry of appellant Ferro's plea
1 month, 8 days	April 5, 1974	Dismissal of Indictment 74 Cr. 848
	May 13, 1974	Filing of Government's notice of readiness on Indictment 74 Cr. 322[31]
5 months, 4 days	June 11, 1974	Judge Travia's written opinion
	November 15, 1974	First time case is calendared before Judge Platt
2 months, 3 days	December 18, 1974	Judge Platt's written opinion
	February 21, 1975	Government informs the District Court that Dr. Silvan had a heart attack and is unavailable; see United States v. Boatner, 478 F.2d 737, 742 (2d Cir. 1973).
2 months, 5 days	April 1, 1975	Filing of Indictment 75 Cr. 259
	June 6, 1975	Filing of Government's notice of readiness
1 year, 25 days	Total number of days of delay	

[31]The period from April 5, 1974, the date of the dismissal of Indictment 73 Cr. 848, to April 23, 1974, the filing date of Indictment 74 Cr. 322, should be included as part of the Government's delay. United States v. Flores, supra, 501 F.2d at 1349, is distinguishable. There, the defendant was not under arrest or the subject of a complaint or indictment or "in the midst of a criminal prosecution." Here, appellant Ferro remained in Federal custody to allow the Government to supersede

The inordinate delay in this case which resulted in a violation of the Eastern District's prompt disposition rules requires reversal of the judgement and dismissal of Indictment 75 CR 259.

B. A hearing is required to determine whether the delay between appellant Ferro's arrest and the Government's Notice of Readiness on Indictment 74 CR 322 violated Rule 4 of the Eastern District's Plan for the Prompt Disposition of Criminal Cases.

Appellant Ferro was arrested on March 20, 1973. Indictment 74 CR 322 was filed on April 23, 1974, and the Government's Notice of Readiness was filed on May 13, 1974. This delay of almost 14 months requires reversal of the judgment on Indictment 74 CR 322 and remand for a determination of whether there are any "excluded periods" under Rule 5 of the Eastern District Plan which would toll the period of delay. United States v. Scafo, 470 F.2d 748, 750-751 (2d Cir. 1972); United States v. Valot, 473 F.2d 662, 668 (2d Cir. 1973); United States v. McDonough, 504 F.2d 67, 68 (2d Cir. 1974); United States v. Flores, 501 F.2d 1356, 1360 (2d Cir. 1974); United States v. Furey, 500 F.2d 338, 344 (2d Cir. 1974).

After the Government's Notice of Readiness had been filed, appellant Ferro moved to dismiss Indictment 74 CR 322, arguing

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(Footnote continued from preceding page) . . .

the dismissed indictment. Moreover, appellant's continued custody in New York deprived him of an opportunity to be considered for parole on the sentence he was then serving on a conviction under the laws of Ohio.

that the delay between his arrest and the filing of the Notice of Readiness violated the requirements of Rule 4 of the Eastern District Plan. Without holding a hearing or making specific findings of fact, Judge Travia denied the motion (June 7, 1974; 20). This motion was renewed before Judge Platt on November 20, 1974, and was denied in an opinion rendered on December 18, 197[illegible] The only period of delay considered by the District Court extended from the date of arrest to the date when appellant Ferro entered a plea of not guilty to Indictment 73 CR 848, the first indictment. As to that period, Judge Platt found that Agent McDowall's investigation constituted exceptional circumstances under Rule 5(c)(ii) of the Plan justifying the delay, although Judge Platt did not indicate the specific time periods used for that investigation.

Moreover, the District Court did not examine the period extending from arrest to the filing of the Government's Notice of Readiness for trial on 74 CR 322. By failing to consider this period, Judge Platt effectively excluded the total period of time prior to the dismissal of 73 CR 848. This was incorrect, since the dismissal of Indictment 73 CR 848 did not expunge the time utilized prior to dismissal from the determination of the Government's conpliance with Rule 4's six-month limit. United States v. Flores, supra, 501 F.2d at 1359 n. 3. Moreover, the successive indictments here should be viewed as parts of one continuing prosecution. Hanrahan v. United States, supra. See

Point IIIA of Appellant's Brief at 25-26, infra. It is clear that this is the fact in this case since Count 20 of 73 CR 848 was simply realleged as Count I of the "superceding indictment" 74 CR 322.

Thus, the District Court erroneously failed to consider the delay of 14 months between appellant's arrest and the Notice of Readiness, filed on May 13, 1974. A factual determination of the circumstances causing this delay is required. United States v. Scafo, supra; United States v. Valot, supra; United States v. McDonough, supra; United States v. Flores, supra; United States v. Furey, supra.

C. Appellant's constitutional right to a speedy trial was denied.

On April 9, 1975, approximately nine months prior to trial, appellant Ferro moved to dismiss the pending indictments on the ground, inter alia, that his constitutional speedy trial rights had been denied.[32] The validity of this claim depends upon an analysis and a balancing of the following four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 513 (1972); United States v. Drummond, 511 F.2d

[32]Although trial counsel explicitly relied on Rule 48 of the Federal Rules of Criminal Procedure to support the motion, Rule 48 provides for the enforcement of the Sixth Amendment's right to a speedy trial. Pollard v. United States, 352 U.S. 354, 361 n.7 (1957). See also, United States v. Mann, 291 F. Supp. 268, 275 (S.D.N.Y. 1968); United States v. Infanti, 474 F.2d 522, 527 (2d Cir. 1973).

1049, 1054 (2d Cir. 1975); United States v. Infanti, 474 F.2d 522, 527 (2d Cir. 1973); United States v. Mackay, 491 F.2d 516, 520 (10th Cir. 1973), cert. den., 94 S. Ct. 1996. See also Hanrahan v. United States, 348 F.2d 363, 366-68 (D.C. Cir. 1965) United States v. Mann, supra, 2191 F. Supp. at 270.

Since the length of time from arrest to trial was almost 34 months,[33] inquiry into the other enumerated factors is necessary. Strunk v. United States, 412 U.S. 434, 435 (1973). Barker v. Wingo, supra, 407 U.S. at 530.

Although the reasons for the total period of delay are somewhat unclear on this record (See Appellant's Brief, Point IIIB), it cannot be disputed that at least 13 months were not attributable to appellant Ferro (See Appellant's Brief, Point IIIA). As to this time period, the only conclusion that can be drawn is that the Government was negligent in failing to proceed expeditiously to trial.

The prejudice to appellant Ferro was severe. During much of the time period involved, he was incarcerated in Ohio, serving a sentence imposed under the laws of that State. In March, 1974, appellant Ferro was scheduled for parole consideration by the Ohio authorities. However, his continued incarceration during the spring of 1974 in New York as a result of the pending federal charges prevented this consideration until September, 1974, after having been returned to State custody. As a result of appellant's initial consideration in September, 1974, six months after originally scheduled, appellant Ferro was granted parole.

[33]The length of delay from the original indictment to trial was almost 28 months.

Moreover, the delay here precluded the possibility that appellant might receive a sentence at least partially concurrent with the one he was serving and probably had the effect of lengthening his State sentence; Smith v. Hooey, 393 U.S. 374, 378 (1968); Note, Detainers and the Correctional Process, 1966 Wash. U.L.Q. 417, 429.

Additionally, the pending federal indictment inevitably interfered with the rehabilitative possibilities of appellant's State incarceration. As a former Director of the Federal Bureau of Prisons has stated:

> The strain of having to serve a sentence with the uncertain prospect of being taken into the custody of another state at the conclusion interferes with the prisoner's ability to take maximum advantage of his institutional opportunities.
>
> (Bennett, quoted in Smith v. Hooey, supra, 393 U.S. at 379.)

Early and often in the proceedings appellant Ferro asserted his rights to a speedy trial and moved to dismiss the pending indictments.

Moreover, in order to expedite the possibility that appellant would receive a prompt trial, on October 26, 1973, trial counsel moved to sever appellant Ferro's case from that of his co-defendant Cyphers. On July 28, 1975, after co-defendant Cyphers failed to appear, appellant Ferro again moved for a severance. The denial of this motion, on the facts of this case, was improper.

Although generally a motion for severance is addressed to the discretion of the trial court, United States v. Peden, 472 F.2d

583, 584 (2d Cir. 1973); United States v. Borelli, 435 F.2d 500, 502 (2d Cir. 1970); see 8 Moore's Federal Practice, Chapt. 14, this Court has indicated that severance is an appropriate mechanism to vindicate speedy trial rights, protecting both the interest of the defendant and that of the public. United States v. Lasker, 481 F.2d 229, 234 (2d Cir. 1973); see ABA Standards Relating to Speedy Trial, Commentary at p. 31; ABA Standards Relating to Joinder and Severance, §2.3(b)(1). The motion for severance made July 28, 1975, should have been granted here, since it would have shortened considerably the period from arrest to trial. Its denial, in light of the long delay which had already occurred, was arbitrary.

Thus, the delay in this case violated both the Eastern District's Plan for the Prompt Disposition of Criminal Cases and appellant Ferro's constitutional right to a speedy trial guaranteed by the Sixth Amendment. Reversal of the judgments and dismissal of the indictments with prejudice is required.

POINT IV

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT FERRO JOINS IN THE ARGUMENTS RAISED BY HIS CO-DEFENDANT IN THIS COURT INSOFAR AS THEY ARE APPLICABLE TO HIM AND NOT INCONSISTENT WITH THE POINTS RAISED HEREIN.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENTS OF THE DISTRICT COURT SHOULD BE REVERSED AND THE INDICTMENTS DISMISSED WITH PREJUDICE; ALTERNATIVELY, THE JUDGMENT OF CONVICTION ON INDICTMENT 74 CR. 322 SHOULD BE REVERSED AND THAT INDICTMENT DISMISSED; IN THE FURTHER ALTERNATIVE, THE JUDGMENT OF CONVICTION ON INDICTMENT 74 CR 322 SHOULD BE REVERSED AND REMANDED FOR AN EVIDENTIARY HEARING TO DETERMINE THE GOVERNMENT'S COMPLIANCE WITH RULE 4 OF THE EASTERN DISTRICT'S PLAN FOR THE PROMPT DISPOSITION OF CRIMINAL CASES; AND FOR SUCH OTHER AND FURTHER RELIEF AS THIS COURT DEEMS APPROPRIATE.

Respectfully submitted,

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New York, New York
August 31, 1975

CERTIFICATE OF SERVICE

September 3, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Jonathan J. Silbermann

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